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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 255

HOLMES MARCY DAVENPORT, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 71-73) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 12, 1952 (R. 73). A petition for rehearing was denied July 14, 1952 (R. 79). The petition for a writ of certiorari was filed August 5,

1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the charge to the jury, to which no objection was made at the trial, was adequate.

2. Whether proof of possession of narcotics was sufficient to prove venue.

3. Whether it was proper to permit an experienced police officer to explain that a device found in the search of defendants premises was customarily used by handlers of narcotics.

STATUTE INVOLVED

26 U.S.C. 2553(a) (53 Stat. 271, as amended, 58 Stat. 721) provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and

3220 shall be prima facie evidence of liability to such special tax.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Texas of violating 26 U.S.C. 2553(a) by the unlawful purchase of a narcotic drug, pantopon, not in the original stamped package and without appropriate stamps affixed thereto (R. 6-7). He was sentenced to imprisonment for two years (R. 7). On appeal, the judgment was affirmed (R. 73).

Before trial, petitioner moved for a continuance on the ground that his principal attorney, Mr. Wade, was ill (R. 4-5). The United States Attorney opposed the motion, stating that Wade's associate, who was in court, had represented petitioner from the inception of the case, that strenuous efforts had theretofore been made to get the case postponed and that additional trial counsel, who was present in court prepared to assist in the defense if the motion were overruled, was known to be very competent (R. 8-9). The court overruled the motion (R. 10).

The evidence for the Government was to the effect that on July 22, 1951, at about two o'clock in the morning, state police officials, armed with a state search warrant, entered premises in which petitioner resided, and, after awakening petitioner, handed him the warrant (R. 13-16, 20-21, 35-37, 39-40). On the windowsill near petition-

er's bed were cigarettes, a cigarette lighter, and a small bottle (R. 16, 18, 19-20, 40), the contents of which, upon analysis, were found to include 51 tablets of a derivate of opium known as pantopon hydrochloride (R. 51). The officers also found other narcotics and a finger-stall, a device commonly used by handlers of narcotics (R. 31-34).

The state officers testified that they were not working with federal agents (R. 14-15, 26, 47), but that they did intend, if narcotics were found, to submit the case to federal authorities for adoption (R. 26, 45).

Defendant testified that the pantopon was not his (R. 53-54) and that the room in which he was found was that of a girl to whom he had rented it (R. 53).

In submitting the case to the jury, the judge read the indictment (R. 61) and again repeated its substance in telling the jury what it must find (R. 62-63). He summarized the evidence and gave an instruction on the factors to be considered in judging circumstantial evidence (R. 63-64). He specifically charged that if, from any ruling of any portion of the charge, the jury received the impression that the court had an opinion, they were to disregard that impression since they were the sole judges of the facts (R. 64-65).

Defense counsel entered an objection to a statement that cigarettes were found on the window-sill, but when the judge pointed out that he had said such was the testimony of the government,

counsel said he had no further objection (R. 65-66).

ARGUMENT

1. Petitioner's contention that the trial judge failed properly to instruct the jury on the law (Pet. 3, 4, 11-13) is obviously without merit. The charge of the indictment was a simple one and was twice given to the jury, once in *haec verba,* and once in summary statement. The only real issue was whether the drug was in petitioner's possession, an inescapable inference if the testimony of the officers was credited, or whether, as petitioner claimed, he knew nothing about the drug. That issue the judge left to the jury after summarizing the testimony and instructing them as to the factors to be considered in evaluating it. Significantly, experienced trial counsel entered no objection to the charge. Petitioner is therefore clearly precluded under Rule 30, F.R. Crim. P., from raising for the first time on appeal, the general objection he now makes.

2. In support of his argument that there was no evidence of venue (Pet. 3, 4, 13-15), petitioner cites cases disapproved and in effect overruled by this Court in *Casey* v. *United States,* 276 U.S. 413, 417-418. It has long been settled that possession of the proscribed drugs constitutes *prima facie* evidence, not only of illegal purchase, but of venue. *Casey* v. *United States, supra; United*

States v. *Pisano*, 193 F. 2d 355, 360 (C.A. 7); *United States* v. *Chiarelli*, 192 F. 2d 528, 532 (C.A. 7), certiorari denied, 342 U.S. 913; *Frazier* v. *United States*, 163 F. 2d 817, 818 (C.A. D.C.), affirmed, 335 U.S. 497.

3. The testimony of the police officer explaining the nature of a finger-stall, such as that found in the course of the search of petitioner's residence,[1] (R. 31-34) clearly was not, as petitioner contends (Pet. 3, 5, 15-16), improper hearsay testimony. The defense on cross-examination first brought out the fact that the officers found narcotics in addition to the tablets involved in the charge for which petitioner was tried (R. 24). On re-direct, the officer was asked to specify the nature of such other narcotics. He mentioned that some were found in a finger-stall and explained what that was (R. 31-34). The officer, with fifteen years' experience in police detective work, was obviously qualified to explain why he knew the device to be a finger-stall and for what purpose it was generally used. Cf. *Shew* v. *United States*, 155 F. 2d 628 (C.A. 4), certiorari denied, 328 U.S. 870.

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[1] While petitioner does not attack the validity of the search, he insinuates that there was impropriety in obtaining the warrant (Pet. 15-16). As the court below points out (R. 72), the insinuations find no support in the record. The officers testified that they obtained the warrant before they made any search (R. 29-30, 44) and that they waited two days to make the search to be certain the narcotics would be there (R. 43).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1952.

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